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Jesse B. Stone v. SALT LAKE CITY, a municipal corporation, J. BRACKEN LEE, JOE L. CHRISTENSON, L. C. ROMNEY, T. I. GEURTS and J. K. PIERCEY, its Commissioners, CHAMBER OF COMMERCE OF SALT LAKE CITY, and GUS P. BACKMAN, its Secretary, ZIONS SECURITIES CORPORATION, a corporation, and THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a corporation sole : Brief of Appellant

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Elias Hansen; Burton W. Musser; Attorneys for Plaintiff and Appellant.

Unknown.

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BRIEF

9268PI

in the Supreme Court  
of the State of Utah

JESSE B. STONE, *Plaintiff and Appellant,*

vs.

SALT LAKE CITY, a municipal corpora-  
tion, J. BRACKEN LEE, JOE L. CHRIS-  
TENSON, L. C. ROMNEY, T. I.  
GEURTS and J. K. PIERCEY, its Com-  
missioners, CHAMBER OF COM-  
MERCE OF SALT LAKE CITY, and  
GUS P. BACKMAN, its Secretary,  
ZIONS SECURITIES CORPORATION,  
a corporation, and THE CORPORA-  
TION OF THE PRESIDENT OF THE  
CHURCH OF JESUS CHRIST OF  
LATTER-DAY SAINTS, a corporation  
sole,  
*Defendants and Respondents.*

Case No.  
9268

APPEALED FROM THE THIRD JUDICIAL DISTRICT  
COURT IN AND FOR SALT LAKE COUNTY, UTAH

Brief of Plaintiff and Appellant

ELIAS HANSEN,  
BURTON W. MUSSER,  
*Attorneys for Plaintiff and  
Appellant*

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# In the Supreme Court of the State of Utah

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JESSE B. STONE, *Plaintiff and Appellant,*

vs.

SALT LAKE CITY, a municipal corporation, J. BRACKEN LEE, JOE L. CHRISTENSON, L. C. ROMNEY, T. I. GEURTS and J. K. PIERCEY, its Commissioners, CHAMBER OF COMMERCE OF SALT LAKE CITY, and GUS P. BACKMAN, its Secretary, ZIONS SECURITIES CORPORATION, a corporation, and THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a corporation sole,  
*Defendants and Respondents.*

Case No.  
9268

---

APPEALED FROM THE THIRD JUDICIAL DISTRICT  
COURT IN AND FOR SALT LAKE COUNTY, UTAH

---

## Brief of Plaintiff and Appellant

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## STATEMENT OF CASE

Plaintiff brought this action against the defendants to secure the following relief:

### BY HIS FIRST CAUSE OF ACTION

1. To have declared null and void a purported bid of Salt Lake City Chamber of Commerce to purchase the property belonging to Salt Lake City which is located at the southeast intersection of First South and State Streets in Salt Lake City, Utah.

2. To have declared void the purported acceptance of the above mentioned bid of the Salt Lake Chamber of Commerce by defendant Salt Lake City.

3. The defendant, Salt Lake City, be enjoined from entering into a contract or undertaking whereby it agrees to convey the property above mentioned to the Chamber of Commerce or to defendant, Corporation of the President of the Church of Jesus Christ of Latter-day Saints, or to defendant, Zions Securities Corporation, or any of their agencies or subsidiaries.

4. To enjoin defendants, Salt Lake City and its Commissioners, from conveying the above mentioned city property to anyone until it has provided facilities for its officers and employes while engaged in the performance of the governmental functions of defendant city.

5. To have it adjudged that neither defendant, Zions Securities Corporation, nor defendant, Corporation of the President of the Church of Jesus Christ of Latter-day Saints,

may purchase a site for the erection thereon of a Federal Building, nor use any of their assets in payment of the purchase price thereof.

6. That such other and further relief be granted as may appear to be just and proper, and for costs (R. 10).

In a Second Cause of Action plaintiff seeks to have declared null and void a purported Contract wherein defendant City seeks to sell and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints seeks to purchase a tract of land consisting of approximately 64.59 acres in Blocks 45 and 46, Ten Acre Plat "A," Big Field Survey, situated in Section 20, Township 1 South, Range 1 East, Salt Lake Meridian, in Salt Lake City and County, Utah, such property being generally known as Forest Dale Park (R. 10).

Lynn Fausett and his wife, Fiametta Fausett, who join in the Appeal filed in the cause, a Petition to Intervene herein, together with a proposed Complaint in Intervention (R. 50). There was also filed in the cause in the court below a request for an Amendment to the Complaint, together with the proposed Amendment thereof (R. 58).

In compliance with Motions to Dismiss filed by each of the defendants, the First Cause of Action was dismissed as to all of the defendants (R. 71). The Second Cause of Action was dismissed as to all of the defendants except Salt Lake City and its Commissioners.

In its Judgment of Dismissal the court below stated that it was not necessary to rule upon the Petition of the Fausetts



to intervene or upon the Motions to sever the two causes of action. No ruling was had on the Motion to Amend (R. 72).

This Appeal is prosecuted from the Judgment so rendered.

Following is a summary of the allegations of the Complaint:

1. That the plaintiff is and at all times alleged in the Complaint has been a property owner and taxpayer of Salt Lake City, Utah, and for a number of years was a member of and a tithe payer and contributor to the Church of Jesus Christ of Latter-day Saints, and as such has an interest in the trust fund held by defendants, Zions Securities Corporation and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints, and that he brings the action for himself and all other persons similarly situated.

2. That Salt Lake City is and at all times alleged in the Complaint has been a Municipal Corporation of Utah, and that J. Bracken Lee, Joe L. Christensen, L. C. Romney, T. I. Geurts, and J. K. Piercey are and since January, 1960, have been its Commissioners.

3. The defendant, Corporation of the President of the Church of Jesus Christ of Latter-day Saints, is a corporation sole, organized for religious and charitable purposes under the laws of the State of Utah, and David O. McKay is and has been at all times alleged in the Complaint the constituted Corporation Sole, of such Corporation.

4. That defendant, Zions Securities Corporation, is and at all times alleged in the Complaint has been a Utah Corporation.

5. That all of the capital stock of defendant, Zions Securities Corporation (except a few shares placed in the names of its Directors to enable them to qualify as Directors thereof), is owned by defendant, Corporation Sole, and that defendant, Zions Securities Corporation, is and at all times alleged in the Complaint has been engaged solely in carrying out a part of the business of defendant Corporation Sole.

6. That defendant, Chamber of Commerce, is a non-profit Utah Corporation, and that Gus P. Backman is and during the time mentioned in the Complaint was its Secretary.

7. That the purpose or object of defendant Corporation Sole as stated in its Articles of Incorporation is to acquire, hold and dispose of such real and personal property as may be conveyed to or acquired by it for the benefit of the members of the Church of Jesus Christ of Latter-day Saints, a religious society, for the benefit of religion, for works of charity and for public worship.

8. That the purpose of defendant, Chamber of Commerce, as stated in its Last Amendment to its Articles of Incorporation is "to promote the general welfare of the City and County of Salt Lake and State of Utah, to engage and assist in social relief work therein and to carry on such other and related activities as are ordinarily and normally engaged in by Chambers of Commerce."

9. That the Articles of defendant, Chamber of Commerce, also provide that the management and control thereof shall be vested in a Board of Governors, eight of whom shall constitute a quorum.

10. That heretofore the Board of Education of Salt Lake City granted an option to defendant, Zions Securities Corporation, to purchase for the sum of \$750,000 a tract of land upon which the Lafayette School is situated. In such option it was recited that the property for which the option was granted was to be used for the erection thereon of a Federal Building.

11. That an action was brought to enjoin the Board of Education from selling the Lafayette School site, and a Lis Pendens was recorded in the office of the County Recorder of Salt Lake County, giving notice that such action had been brought.

12. That no restraining order was issued in said action, and pursuant to the above mentioned option the property covered by the option was conveyed to Zions Securities Corporation, which now holds the title to the Lafayette School property for the purpose of having erected thereon a Federal Building.

13. That on February 4, 1960, a purported bid was made by defendant, Chamber of Commerce, to Salt Lake City to purchase the property at First South and State Streets. Such purported bid is set out in full in paragraph 13 of the Complaint. Among its provisions are the following:

"That the price shall be \$750,000.00 if possession is given on or before January 1, 1961, and \$725,000.00 if possession is given on or before March 23, 1961. That there must be furnished either an abstract of title or title insurance of the property and the title shall be subject to approval by the General Services Administration of the United States Government."

The purported bid provided for payment of the purchase price by installments and further that if an action were brought to nullify the contract of sale, or if a referendum election were called to question the validity of the sale of property, the bidder at its option would be released from purchasing the property, and any money paid would be returned to the bidder. The purported bid also provided that the property would be conveyed to whomsoever the bidder should designate. A Cashier's Check for \$15,000 accompanied the purported bid.

14. In paragraph 14 of the Complaint the property intended to be covered by the purported bid is described by metes and bounds.

15. In paragraph 15 of the Complaint it is alleged upon information and belief that defendant, Chamber of Commerce, was without authority to make the purported bid for the city property; that Gus P. Backman was not authorized by the Chamber of Commerce to make such purported bid.

16. In paragraph 16 of the Complaint it is alleged upon information and belief that the purported bid made by Gus P. Backman for the purchase of the city property was made at the solicitation of defendant, Corporation of the President, and as its agent, Zions Securities Corporation.

17. In paragraph 17 of the Complaint it is alleged upon information and belief that if the above mentioned city property is acquired by either of the defendants, Chamber of Commerce, Gus P. Backman, Zions Securities or the Corporation of the President, it is planned by them to induce the General

Services Administration to purchase the same for the erection thereon of a Federal Building.

18. In paragraph 18 it is alleged on information and belief that to secure a site suitable for a Federal Building it is necessary that property in addition to that owned by the City must be purchased at a cost of several hundred thousand dollars.

19. In paragraph 19 plaintiff alleges upon information and belief that if the purported arrangement for the sale of the city property is permitted to be carried out, defendant Corporation of the President, or its owned Zions Securities Corporation, will be compelled to pay several hundred thousand dollars for a site for a Federal Building in addition to the amount that will be received from the federal government.

20. In paragraph 20 of the Complaint it is alleged on information and belief that defendants, Gus P. Backman and the Corporation of the President, intend to and will unless restrained by the Court carry out the plan to furnish a site for the construction thereon of a Federal Building, and that such plan and agreement is null and void because:

(a) That defendants, Corporation of the President by its agent, Zions Securities, already have a title to a tract of land known as the Lafayette School site, which it acquired under the pretext that the same was to be used for the erection thereon of a Federal Building, and is estopped from securing an additional site for the same purpose, there being only one Federal Building in contemplation of being constructed at this time in Salt Lake City.

(b) That neither the Corporation of the President nor Zions Securities have any right to use the trust fund held by them to pay for a site for a Federal Building or any part thereof.

(c) and (d) That neither defendant, Corporation of the President, nor defendant, Zions Securities, had at the time complained of any right or authority to purchase a site for a Federal Building, nor to select a site for a Federal Building.

(e) and (f) That if defendant Corporation of the President and/or Zions Securities Corporation is permitted to prevail upon an officer of the United States to select a site for the purpose of pleasing such defendants, and by paying a substantial part of the purchase price, if so purchased, such action will be in violation of Section 4, Article I of the Constitution of Utah, which provides that "there shall be no union of Church and State, nor shall any Church dominate the State nor interfere with its function," and likewise such action will be in violation of the Fifth Amendment to the Constitution of the United States, and also in violation of Section 7, and of Section 22, of Article I of the Constitution of Utah, which provide that private property may not be taken without due process of law, nor may such property be taken without just compensation. That if the beneficiaries of the trust fund are deprived of their interest in the trust fund in the manner attempted they will be deprived of such interest without due process of law and without just compensation.

21. In paragraph 21 of his Complaint, plaintiff alleges on information and belief that defendant City was without authority to accept the purported bid for sale of its property at First South and State Streets, and is without authority at this time to sell such property because:

(a) That four members of the Commission of defendant City are and at the time the above mentioned purported bid was made were members of the Church of Jesus Christ of Latter-day Saints, and as such had an interest in the trust fund of defendant, Corporation of the President, and of Zions Securities; that it was and is planned by the defendants herein that the City property at First South and State Streets be conveyed to defendant, Zions Securities, in which the four members of defendant City are beneficiaries, and that said City property is, according to such plan, to be conveyed to the United States Government as a site for a Federal Building. That at the time said purported bid was made and purported to have been accepted, said Commissioners who were and are members of said Church and as such were disqualified from participating in the transaction above mentioned by reason of the provisions of *Utah Code Annotated*, 1953, 10-6-38.

(b) That one of the cardinal principles of the Church of Jesus Christ of Latter-day Saints is that its members shall comply with the announced desires of its leaders, and particularly its President and Counselors. That when it was learned that difficulties were encountered in the proposed construction of a Federal Building on the Lafayette School site, it was conceived by the leaders of the Church that another site should be acquired. That defendant Gus P. Backman, a member of said Church, was called upon by the leaders of said Church to aid in an undertaking to acquire the above mentioned City property, and to get the consent of the proper officers of the United States to accept the same as a site for a Federal Building. That when it was learned that the leaders of the Church of Jesus Christ of Latter-day Saints desired to purchase the above men-

tioned City property for the erection thereon of a Federal Building, defendant, City Commissioners, proceeded to have the property appraised, to have the same declared obsolete, to advertise the same for sale so that a sale might be made to defendant, Zions Securities Corporation, so that the same might in turn be sold to the United States.

(c) That the purported bid of Gus P. Backman for and on behalf of defendant, Chamber of Commerce, having been made without authority, any contract made pursuant thereto will cast a cloud on the title to the City property above described.

(d), (e) and (f) That the above mentioned City property is now and for years past has been devoted to furnishing offices and other facilities for officers of defendant City in the performance of the governmental functions of the City; that such building is reasonably adequate to serve such purposes for a number of years, and that no adequate arrangements have been made for other buildings to serve such purpose, and defendant City is without funds to provide for other buildings to serve for the purposes which are now being provided for by the above mentioned building at First South and State Streets.

(g) That neither defendant, Zions Securities Corporation, the Corporation of the President, Gus P. Backman, nor the Chamber of Commerce, have the authority to purchase the above mentioned City property for the purpose of conveying the same to the United States, and that the purported agreement to sell the same for such purpose will cast a cloud on the title of defendant City, and prevent the City from selling



the same to some other purchaser until after such cloud is removed.

For a Second Cause of Action, plaintiff in substance alleges:

He adopts as a part of his Second Cause of Action the allegations of paragraphs 1, 2, 3, 7 and all relevant allegations contained in his First Cause of Action.

In paragraph 2 of his Second Cause of Action he alleges that prior to January 14, 1959, defendant City was the owner of approximately 64.59 acres of land located in Blocks 45 and 46, Ten Acre Plat "A," Big Field Survey, situated in Section 20, Township 1 South, Range 1 East, Salt Lake Meridian in Salt Lake City and County, Utah.

In paragraph 3 it is alleged: That on January 14, 1959, defendant City and defendant Corporation of the President entered into a contract wherein the City agreed to sell and the Corporation of the President agreed to purchase the property above described.

In paragraph 4 it is alleged that the property above described is known as the Forest Dale Park, and for a number of years prior to the time the above mentioned agreement was entered into was used by the inhabitants of Salt Lake City for playing golf and other forms of amusements for which parks are generally used.

In paragraph 5 of the Second Cause of Action, it is alleged that all of the members of the Commission of defendant City were, at the time the above mentioned agreement was entered into, members of the Church of Jesus Christ of Latter-

day Saints, holding important positions therein, and as such had an interest in all of the property held by defendant Corporation of the President, and that because thereof were disqualified from participating in the making of said contract by reason of the provisions of *U.C.A. 1953, 10-6-38*.

In paragraph 6 of his Second Cause of Action plaintiff alleges that defendant City did not give notice, did not pass any valid authorization for the execution of said Contract, or declare that said park is no longer useful for the purposes of a City Park, or otherwise inform the citizens of Salt Lake City that said park would be sold or abandoned as a park.

Plaintiff prayed that the Contract for the sale of the Forest Dale Park be declared null and void, and for general relief (R. 11).

Lynn Fausett and Fiametta Fausett filed a Motion to Intervene in the above entitled cause, together with a proposed Complaint in Intervention. The basis for leave of the Fausetts to intervene as alleged in their Motion is that plaintiff in the action was not presently a member of the Church of Jesus Christ of Latter-day Saints, and, therefore, is without interest in the trust fund held by the defendants Corporation of the President and/or Zions Securities; that the applicants may be bound by a judgment rendered in the action, and will be adversely affected by the use of the trust fund held by such defendants, if the same is used for paying a part of the purchase price of a site for a Federal Building, and that if they are not permitted to intervene, needless delay and cost will be incurred by the bringing of a separate action.

In their proposed Complaint in Intervention the Fausetts allege that they are and at all times alleged in their proposed Complaint in Intervention have been tithe payers and contributors to the trust fund held by said defendants, and as such have an interest in such trust fund; that they are and at all times alleged in the Complaint have been residents and taxpayers in Salt Lake City and County, Utah. By their proposed Complaint in Intervention the Fausetts bring their action for and on behalf of all other persons similarly situated, and they adopt the allegations of the Complaint as a part of their Complaint in Intervention.

The Fausetts prayed judgment as prayed for in the Complaint (R. 51).

Plaintiff and the Fausetts asked leave to file an Amendment to the Complaint wherein they alleged that the City Commission did not adopt any Resolution or Ordinance as to the sale of the property referred to; that no lawful bid was submitted; that there was no bid for such property, nor a lawful acceptance of any bid, and the proceedings had on January 28th, and on February 4, 1960, were each of no force or effect to legalize the unlawful attempt to sell said property (R. 58).

Each of the defendants filed a Motion to Dismiss each of the Causes of Action. The Trial Court granted the Motion of each of the defendants to dismiss the First Cause of Action and also the Second Cause of Action as to each of the defendants except the Motion of Salt Lake City and its Commissioners, which was denied (R. 72). Defendants Salt Lake City and its Commissioners also filed in the cause an Answer in

which some of the allegations of the Complaint were admitted, and others were denied (R. 28).

Defendants also filed objections to the Fausetts filing their Complaint in Intervention, and also Motions to sever the two causes of action.

The Trial Court refused to pass upon these matters for the stated reason that it was not necessary to do so. No mention was made by the Trial Court with respect to the Motions of plaintiff for leave to amend his Complaint.

It is upon the pleadings so summarized and the Judgment rendered thereon that this appeal is prosecuted.

Appellant relies upon the following Points for reversal of the Judgment appealed from:

#### POINT ONE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS SALT LAKE CITY AND ITS COMMISSIONERS TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT SAID DEFENDANTS FAILED TO COMPLY WITH THE PROVISIONS OF U.C.A. 1953, 10-7-2, and 10-8-8, BEFORE MAKING ITS PURPORTED CONTRACT TO SELL THE PROPERTY AT FIRST SOUTH AND STATE STREETS.

#### POINT TWO

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS SALT LAKE CITY AND

ITS COMMISSIONERS TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT SAID DEFENDANTS DID NOT PASS ANY LAWFUL RESOLUTION OR DECLARATION OF THEIR INTENTION TO SELL THE PROPERTY AT FIRST SOUTH AND STATE STREETS, DID NOT GIVE ANY LAWFUL NOTICE OF THE SALE OF SAID PROPERTY, DID NOT RECEIVE ANY LAWFUL BID FOR THE SALE OF SAID PROPERTY, DID NOT MAKE A LAWFUL ACCEPTANCE OF A BID FOR THE SALE OF SAID PROPERTY, AND DID NOT ENTER INTO A LAWFUL CONTRACT FOR THE SALE THEREOF.

### POINT THREE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS SALT LAKE CITY AND ITS COMMISSIONERS TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT THE PURPORTED BID MADE FOR THE PROPERTY AT FIRST SOUTH AND STATE STREETS WAS MADE BY DEFENDANT CHAMBER OF COMMERCE BY ITS SECRETARY, WHICH BID SHOWS ON ITS FACE THAT THE SAME WAS FOR SOME ONE OTHER THAN THE CHAMBER OF COMMERCE, AND IT WAS KNOWN, OR SHOULD HAVE BEEN KNOWN BY DEFENDANTS CITY AND ITS COMMISSIONERS THAT DEFENDANT CHAMBER OF COMMERCE WAS WITHOUT AUTHORITY TO MAKE A BID FOR THE PURCHASE OF SAID PROPERTY, AND WITHOUT FUNDS TO PAY FOR THE SAME.

#### POINT FOUR

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST DEFENDANTS CITY AND ITS COMMISSIONERS, IN THAT ALL BUT ONE OF THE COMMISSIONERS WERE AT THE TIME OF THE PURPORTED CONTRACT OF SALE MEMBERS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND AS SUCH DISQUALIFIED FROM ENGAGING IN A TRANSACTION FOR A SALE OF THE PROPERTY AT FIRST SOUTH AND STATE STREETS TO DEFENDANTS, CORPORATION OF THE PRESIDENT AND/OR ZIONS SECURITIES CORPORATION BY REASON OF THE PROVISIONS OF U.C.A. 1953, 10-6-38.

#### POINT FIVE

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST DEFENDANTS CITY AND ITS COMMISSIONERS WITHOUT GIVING THE PLAINTIFF AN OPPORTUNITY TO ESTABLISH THE FACTS ALLEGED IN HIS COMPLAINT TO THE EFFECT THAT THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS IS BEING USED FOR OFFICES FOR THE EMPLOYEES AND OFFICERS OF DEENDANT CITY IN THE PERFORMANCE OF GOVERNMENTAL FUNCTIONS; THAT THE BUILDINGS THERE LOCATED ARE AMPLE TO SERVE SUCH PURPOSE FOR MANY MORE YEARS; THAT NO PROVISION HAS BEEN MADE FOR

ACQUIRING FACILITIES TO TAKE CARE OF THE NEEDS THAT ARE NOW BEING PROVIDED FOR BY THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS, AND DEFENDANT CITY IS PRESENTLY WITHOUT THE NECESSARY FUNDS TO SECURE OTHER BUILDING OR BUILDINGS TO SUPPLY THE NEEDS OF DEFENDANT CITY WHICH ARE NOW PROVIDED FOR BY THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS.

POINT SIX

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MOTION OF LYNN FAUSETT AND FIAMETTA FAUSETT TO INTERVENE IN THIS ACTION.

POINT SEVEN

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST DEFENDANT CORPORATION OF THE PRESIDENT AND/OR DEFENDANT ZIONS SECURITIES CORPORATION WITHOUT GIVING PLAINTIFF AN OPPORTUNITY TO SHOW AS ALLEGED IN HIS COMPLAINT THAT SUCH CORPORATION INTENDS TO AND WILL, UNLESS RESTRAINED BY THE COURT, UNLAWFULLY AND WITHOUT AUTHORITY USE SOME OF THE TRUST FUNDS HELD BY IT FOR THE PURPOSE OF PAYING OR CAUSE TO BE PAID SOME OF THE COSTS OF PURCHASING A SITE FOR A FEDERAL BUILDING.

#### POINT EIGHT

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST THE DEFENDANT ZIONS SECURITIES CORPORATION, IN THAT SUCH CORPORATION ALREADY HAS RECEIVED A CONVEYANCE FROM THE BOARD OF EDUCATION OF SALT LAKE CITY FOR A SITE KNOWN AS THE LAFAYETTE SCHOOL SITE UNDER THE PRETEXT THAT THE SAME IS FOR THE ERECTION THEREON OF A FEDERAL BUILDING, THAT ONLY ONE FEDERAL BUILDING IS PLANNED AT THIS TIME, AND BY REASON OF SUCH FACT DEFENDANT ZIONS SECURITIES CORPORATION IS ESTOPPED FROM SEEKING ANOTHER SITE FOR A FEDERAL BUILDING.

#### POINT NINE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT ZIONS SECURITIES CORPORATION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT, AS ALLEGED IN THE COMPLAINT SAID DEFENDANT IS WITHOUT AUTHORITY TO USE THE TRUST OR OTHER FUNDS HELD BY IT TO PAY PART OF THE PURCHASE PRICE OF A SITE FOR A FEDERAL BUILDING.

#### POINT TEN

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT ZIONS SECURITIES COR-



PORATION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT, AS ALLEGED IN THE COMPLAINT, TO PERMIT SAID DEFENDANT AND ITS OWNER, DEFENDANT CORPORATION OF THE PRESIDENT, TO USE THE TRUST FUND ENTRUSTED TO THEM FOR THE PURPOSE OF PAYING PART OF THE PURCHASE PRICE OF A FEDERAL BUILDING IT WILL RESULT IN THE TAKING OF PROPERTY OF THE BENEFICIARIES OF SUCH TRUST FUND WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE PROVISIONS OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND OF SECTION 7 OF ARTICLE ONE OF THE CONSTITUTION OF UTAH, AND LIKEWISE CONTRARY TO AND IN VIOLATION OF SECTION 22 OF ARTICLE ONE OF THE CONSTITUTION OF UTAH AND OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDE THAT PRIVATE PROPERTY MAY NOT BE TAKEN FOR A PUBLIC USE WITHOUT JUST COMPENSATION.

#### POINT ELEVEN

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT ZIONS SECURITIES CORPORATION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT PLAINTIFF BY SUCH RULING IS DEPRIVED OF HIS RIGHT TO SHOW THAT BY THE TRANSACTION BY WHICH DEFENDANT ZIONS SECURITIES, AND ITS OWNER, THE CORPORATION OF

THE PRESIDENT, SEEK TO INDUCE THE UNITED STATES TO SELECT A SITE FOR A FEDERAL BUILDING PROPERTY WHICH IS NECESSARY AND IS BEING USED FOR THE PERFORMANCE OF ITS GOVERNMENTAL FUNCTIONS AS AN ARM OF THE STATE, AND IN AN ATTEMPT TO DOMINATE THE STATE AND TO INTERFERE WITH ITS FUNCTIONS, CONTRARY TO AND IN VIOLATION OF SECTION 4 OF ARTICLE ONE OF THE CONSTITUTION OF UTAH.

#### POINT TWELVE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS CHAMBER OF COMMERCE AND ITS SECRETARY, GUS P. BACKMAN, TO DISMISS THE FIRST CAUSE OF ACTION, IN THAT SUCH DEFENDANTS BEING PARTIES TO THE PURPORTED CONTRACT FOR THE SALE OF THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS ARE INDISPENSABLE PARTIES TO PLAINTIFF'S FIRST CAUSE OF ACTION.

#### POINT THIRTEEN

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS DEFENDANT CORPORATION OF THE PRESIDENT FROM THE SECOND CAUSE OF ACTION, IN THAT SUCH DEFENDANT IS AN INDISPENSABLE PARTY TO THE ACTION INVOLVING THE VALIDITY OF THE PURPORTED CONTRACT WHEREBY DEFENDANT CITY SEEKS TO SELL AND

DEFENDANT CORPORATION OF THE PRESIDENT  
SEEKS TO PURCHASE THE FOREST DALE PARK.

POINT FOURTEEN

THE TRIAL COURT ERRED IN GRANTING THE  
MOTION OF DEFENDANT CORPORATION OF THE  
PRESIDENT AND OF ITS OWNED DEFENDANT ZIONS  
SECURITIES CORPORATION TO DISMISS PLAINTIFF'S  
SECOND CAUSE OF ACTION, IN THAT, BY SUCH DIS-  
MISSAL, PLAINTIFF IS PREVENTED FROM SHOWING  
THAT SUCH DEFENDANTS ARE DOMINATING THE  
FUNCTIONS OF AN AGENCY OF THE STATE OF  
UTAH, AND INTERFERING WITH ITS FUNCTION  
CONTRARY TO AND IN VIOLATION OF SECTION 4  
OF ARTICLE ONE OF THE CONSTITUTION OF UTAH.

POINT FIFTEEN

THE TRIAL COURT ERRED IN FAILING TO DENY  
THE VARIOUS MOTIONS OF DEFENDANTS TO SEVER  
THE TRIAL OF THE TWO CAUSES OF ACTION.

POINT SIXTEEN

THE TRIAL COURT ERRED NOT ONLY IN THE  
MATTERS HEREINBEFORE MENTIONED, BUT IN FAIL-  
ING TO HAVE THIS CASE PROCEED TO A FINAL  
DETERMINATION IN THE MANNER PROVIDED BY  
LAW AND THE PRACTICE OF THE COURT TO THE  
END THAT SALT LAKE CITY MAY ACQUIRE A FED-  
ERAL BUILDING IN A LAWFUL MANNER.

## ARGUMENT

It will be seen that Appellants have raised numerous points on this appeal. We have done so for the purpose of an attempt to receive an adjudication of all the questions raised by the pleadings so that this Court may render such a Decree as will set at rest the various matters which divide not only the parties to this action, but the public generally. We are mindful that the law applicable to the defendants Corporation of the President and Zions Securities Corporation is probably the same, that is to say, all of the stock of defendant Zions Securities being owned by the Corporation of the President, the former Corporation may lawfully perform only such functions as may lawfully be performed by the Corporation of the President. If the Court should conclude otherwise, we have by our points attacked the judgment of the Trial Court as if the Corporation of the President and Zions Securities are vested with separate and distinct authority. We shall discuss this phase of the case later in this Brief.

The failure of the Trial Court to overrule the various Motions to Dismiss and permit the various defendants to answer, and having done so hold a pretrial may confine the appellants more closely to the allegations of the Complaint than would have been the case if there had been a pretrial, that is to say, a pretrial frequently has the effect of more fully and clearly bringing out the matters which divide the parties to a controversy. However, it is, of course, elementary law that in the dismissal of an action on Motions such as were made in the Court below every fact well pleaded must be taken as true.

## POINT ONE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS SALT LAKE CITY AND ITS COMMISSIONERS TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT SAID DEFENDANTS FAILED TO COMPLY WITH THE PROVISIONS OF U.C.A. 1953, 10-7-2, and 10-8-8, BEFORE MAKING ITS PURPORTED CONTRACT TO SELL THE PROPERTY AT FIRST SOUTH AND STATE STREETS.

*U.C.A. 1953, 10-7-2, provides:*

"When by this title power is conferred upon the Board of Commissioners, City Council or Board of Trustees to do and perform any act or thing and the manner of exercising the same is not specifically pointed out, the board of commissioners, city council or board of trustees may provide by ordinance the manner and details necessary for the full exercise of such powers."

*U.C.A. 1953, 10-8-8, provides:*

"They (commissioners) may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports and public grounds and may vacate the same or parts thereof *by ordinance.*" (Italics ours).

At the oral argument defendant City and its Commissioners cited and seem to get some comfort out of the provision of *U.C.A. 1953, 10-8-2*, which grants to cities authority to dispose of its property and which contains this provision "and may do all other things in relation thereto as natural persons." Obviously such provision does not nullify the provisions of *U.C.A. 1953, 10-7-2* and *10-8-8* above quoted. Moreover, a private

person who holds property in trust may not dispose of the property so held in trust, contrary to the provisions of the instrument creating the trust. As we understand the opinion in the case of *Daisy Rowley v. Milford City*, 352 P2nd 225, this Court held that a city must enact an ordinance as a prerequisite to the sale of its property as required by *U.C.A. 1953, 10-8-8*. In that case the property involved was a city park. Such fact, however, does not relieve the city from the necessity of passing an ordinance as a prerequisite to a valid sale of the property here involved. It will be noted that the act includes "public grounds." The property at First South and State Streets is public ground.

## POINT TWO

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS SALT LAKE CITY AND ITS COMMISSIONERS TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT SAID DEFENDANTS DID NOT PASS ANY LAWFUL RESOLUTION OR DECLARATION OF THEIR INTENTION TO SELL THE PROPERTY AT FIRST SOUTH AND STATE STREETS, DID NOT GIVE ANY LAWFUL NOTICE OF THE SALE OF SAID PROPERTY, DID NOT RECEIVE ANY LAWFUL BID FOR THE SALE OF SAID PROPERTY, DID NOT MAKE A LAWFUL ACCEPTANCE OF A BID FOR THE SALE OF SAID PROPERTY, AND DID NOT ENTER INTO A LAWFUL CONTRACT FOR THE SALE THEREOF.

The authorities are to the effect that the only difference

between a resolution and an ordinance is that the former is temporary in nature, and an ordinance is of a permanent nature. See 62 C.J.S. 778, and cases there cited. See also: *McQuillin Municipal Corporations, 2nd Ed., Vol. 2, page 657.*

The requirements of a valid ordinance and by comparison a resolution are thus enumerated in the Second Edition of *Vol. 2 at page 672, of McQuillin on Municipal Corporations.*

- "1. It must be promulgated by a public or municipal corporation duly created and legally existing.
2. It must emanate by virtue of power in a corporation.
3. It must relate to a subject within the scope of the corporation.
4. It must be in harmony with the Constitution of the United States and the state, the laws and treaties of the United States, the laws of the state, the municipal charter and equity in force in the state.
5. Unless it originated by virtue of express delegated power by the state it must be reasonable in its terms.
6. It must be adopted by the authorized tribunal legally convened.
7. It must be in form as provided.
8. It must be precise, definite and certain in expression.
9. It must be passed in the manner prescribed.
10. It must be enacted in good faith, in the public interest alone, and designed to enable the corporation to perform its true functions as a local government organ."

A reading of the Complaint, together with the Answer of defendants City and its Commissioners, will show that the

proceedings had in connection with the purported contract for the sale of city property at First South and State Streets is full of infirmities that are fatal to its validity. If permitted to do so plaintiff will show that on December 1, 1959, defendant Gus P. Backman as Secretary of the Salt Lake City Chamber of Commerce, wrote a long letter to Adiel F. Stewart, then the Mayor of defendant Salt Lake City, in which letter Mr. Backman outlined the difficulties that would be encountered in the construction of a Federal Building at the Lafayette School site, and that he had taken the matter of securing another site for a Federal Building up with the authorities of Zions Securities and the authorities of the Latter-day Saints Church; that he had also contacted Mr. Franklin G. Floete, Administrator of the General Services Administration of the United States, who indicated he would be willing to consider giving up any claim that the United States may have to purchase the Lafayette School site, provided the Government was made whole in all of the expenditures made to date for architectural, engineering and other expenses in connection with the North Temple location. In that letter Mr. Backman urged Mayor Stewart to take immediate steps to sell the city property at First South and State Streets.

Plaintiff will also show, if and when permitted to do so, that on January 21, 1960, a Resolution was passed to the effect that the buildings of the City were obsolete, and that new suitable structures should be acquired together with a new location upon which to construct the same.

Plaintiff will also show, if and when permitted to do so, that on January 28, 1960, a Motion was made and carried that



the attached Notice for the sale of the Public Safety Building be adopted, and that the City Recorder publish the same; that the City did publish a Notice that the property at First South and State Streets would be sold; that 2% of the price bid must accompany the bid, and that "No bid other than for immediate cash payment will be considered." The first publication of the Notice was had on January 30, 1960, and the last publication on February 2, 1960.

The only bid received was that of defendant Salt Lake Chamber of Commerce by Gus P. Backman, which is set out in full in paragraph 13, beginning on page 3 of the Complaint.

It will be noted that the bid does not comply with the Notice, in that it does not provide for the immediate payment of cash, and moreover, the so-called bid may be withdrawn if a court action is brought to test the validity of the sale, or if a referendum election is brought for such purpose.

Plaintiff will also show, if and when permitted to do so, that defendant City in passing on the bid did not accept the same according to its terms. In the purported acceptance of the bid the City had a number of conditions, among which was that it was able to secure other property, and the amount to be paid by the bidder, if delivery should not be made on January 1, 1961, should be reduced "on a pro-rata basis . . . on a total deduction to \$25,000.00 during the time which the premises are withheld between January 1, 1961, and March 23, 1961."

It will be noted from the Answer filed by defendant City and its Commissioners that no claim is made that any ordinance

was passed authorizing the sale of the property at First South and State Streets.

The Resolution attached to their Answer merely disparages that property. It falls far short of meeting a number of the requirements laid down by *McQuillin on Municipal Corporations* above quoted. Indeed, it does not even provide that the property shall be sold.

While the proceedings had in connections with the purported arrangements to sell the City property at First South and State Streets are so filled with legal infirmities as to render the same without legal effect, they do cast such a cloud on the title of the City to such property as to render it extremely unlikely that anyone else will buy that property so long as the cloud exists .

### POINT THREE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS SALT LAKE CITY AND ITS COMMISSIONERS TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT THE PURPORTED BID MADE FOR THE PROPERTY AT FIRST SOUTH AND STATE STREETS WAS MADE BY DEFENDANT CHAMBER OF COMMERCE BY ITS SECRETARY, WHICH BID SHOWS ON ITS FACE THAT THE SAME WAS FOR SOME ONE OTHER THAN THE CHAMBER OF COMMERCE, AND IT WAS KNOWN, OR SHOULD HAVE BEEN KNOWN BY DEFENDANTS CITY AND ITS COMMISSIONERS THAT DEFENDANT CHAMBER OF COMMERCE WAS WITHOUT AUTHORITY TO MAKE

A BID FOR THE PURCHASE OF SAID PROPERTY, AND  
WITHOUT FUNDS TO PAY FOR THE SAME.

It will be seen from the verified allegations of paragraph 8, page 2, of the Complaint that the Articles of Incorporation of defendant Chamber of Commerce provide that:

"The principal purpose of the corporation shall be to promote the general welfare of the City and County of Salt Lake and the State of Utah, to engage and assist in social relief work therein and to carry on such other related activities as are ordinarily and normally engaged in by Chambers of Commerce."

There is nothing in such Articles which may be said to authorize defendant Chamber of Commerce, or its Secretary, to engage in the business of assisting defendant Corporation of the President or its owned Zions Securities Corporation to prevail upon Mr. Floete of the General Services Administration of the United States to select a site for a Federal Building that meets with the approval of said defendants. It is made apparent by the letter which is quoted in paragraph 13, page 3, of the Complaint that such was the undertaking of the Chamber of Commerce by Gus P. Backman, its Secretary. While the City is authorized by proper procedure to sell its property, the method here adopted is an unreasonable and unlawful means of accomplishing such purpose. It is apparent that the means adopted were for the purpose of enabling defendants Corporation of the President and/or its owned Zions Securities to select a site for a federal building.

Plaintiff having been deprived by the dismissal of the action of the rights granted by *Rules 26 and 33 of the Rules of Civil Procedure*, we are not fully advised as to whether or

not the circuitous proceeding had in connection with the contemplated sale offends against that provision of the common law which holds that the general public has an interest in public buildings which are to serve the public, and that the act of locating a public building at a particular place, if done for the purpose of enhancing private property, or other improper motive, is against public policy, and the courts will not permit the same to be done. That matter is discussed and cases cited in footnotes to 13 C.J. 437, Sec. 337, 17 C.J.S. 583, Sec. 217. It does seem extremely strange that one holding funds in trust for the use of the beneficiaries of the trust should attempt to use the same to assist in purchase of a site for a Federal Building.

#### POINT FOUR

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST DEFENDANTS CITY AND ITS COMMISSIONERS, IN THAT ALL BUT ONE OF THE COMMISSIONERS WERE AT THE TIME OF THE PURPORTED CONTRACT OF SALE MEMBERS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND AS SUCH DISQUALIFIED FROM ENGAGING IN A TRANSACTION FOR A SALE OF THE PROPERTY AT FIRST SOUTH AND STATE STREETS TO DEFENDANTS, CORPORATION OF THE PRESIDENT AND/OR ZIONS SECURITIES CORPORATION BY REASON OF THE PROVISIONS OF U.C.A. 1953, 10-6-38.

It is provided in *U.C.A. 1953, 10-6-38*, that:

"No officer of any municipal corporation shall be directly or indirectly interested in any contract . . . Any violation of the provisions of this section shall be a misdemeanor and every such contract or agreement shall be void."

While the contract here involved purports to be made with the Chamber of Commerce, it will be seen by the bid that such a claim is a sham. If permitted to do so, plaintiff will show that the certified check that accompanied the bid came from defendant Zions Securities Corporation, and that in truth and in fact, the entire transaction was for defendants Corporation of the President and Zions Security Corporation. It is, of course, the uniform holding of the courts, which doubtless requires no citation of authorities, that one may not accomplish indirectly that which can not be accomplished directly.

It is, so far as we are able to ascertain, the uniform holdings of courts of last resort, and likewise the uniform view of respectable text writers, that a contract made between a city and another in which the members of the City Council or Commissioners are interested is void. We direct the attention of the Court to a few of the numerous authorities so holding. It is said in 43 *Am. Jur. Sec. 266, page 81*:

"A public officer owes an undivided duty to the public which he serves and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public. . . . One of the most familiar applications of this doctrine is the rule which prevents an officer having an adverse interest in any contract which he executes on behalf of the public."

In 43 *Am. Jur. Sec. 300*, page 107, it is said:

"The general rule is to the effect that the interest of a public officer or stockholder in a corporation entering into a contractual relation with the public is a prohibited interest in the transaction within the meaning of statutory provisions in substance—prohibiting a public officer from being interested directly or indirectly in any contract with the public and of the common law principal against such interest based upon public policy, of which such statutory provisions are the concrete expression."

We quote at length the following from *Vol. 2, Dillon on Municipal Corporations, Sec. 773*, page 1143:

"At common law and generally under statutory enactment it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality, and this rule applies whether such officer acts alone on behalf of the municipality or as a member of a board or council. Neither the fact that a majority of the votes of a council or board in favor of the contract are cast by disinterested officers, nor the fact that the officer interested did not participate in the proceedings, necessarily relieves the contract from its vice. The fact that the interest of the offending officer in the valid contract is indirect and is very small is immaterial. The statutory prohibition is frequently so wide in its terms as to prohibit any officer from contracting with the municipality whether he takes part in the making of the contract or not. It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality,

if the interest be such as to offset the judgment and conduct of the officer either in the making of the contract or in its performance. In general, the disqualifying interest must be of a pecuniary or proprietary nature. Contracts with firms in which a member of the Council or other municipal officer is a partner falls within the principal and the interest of the officer therein will taint any such contract with illegality. A member of the city council or other municipal officer if interested in a contract so as to taint it with illegality when the contract is made with a corporation of which he is an officer and under some circumstances with a corporation of which he is a stockholder, a contract made by an officer with a municipality contrary to an express statutory prohibition which declares the act to be a criminal offense is void ab initio, although the statute does not pronounce it void. It cannot be given validity by any subsequent ratification short of a new contract made under circumstances absolutely avoiding the statutory prohibition."

In 63 C.J.S. Sec. 988, *beginning on page 557*, it is said:

"Both at common law and under statutory provisions, municipal contracts in which officers or employees of the city have a pecuniary interest are void. The rule rests on public policy and pertinent statutes are merely declaratory of the common law and public policy."

To the same effect is stated to be the law by *McQuillin on Municipal Corporations, Second Ed., Vol. 3, page 1269, Sec. 1354, et seq.* See *same author on page 531, page 629, Vol. 2*, where it is said that contracts from which municipal officers derive personal benefits not general to all citizens are void. Numerous cases are cited in footnotes to the text above mentioned in support thereof.

We direct the attention of the Court especially to a few of the numerous cases which hold that a public officer is disqualified from participating in a contract in which he has a direct or indirect interest.

The case of *Grady v. City of Livingston*, 141 Pac. (2d) 346, (Mont.), contains a lengthy discussion of the law with respect to the members of a City Council being precluded from dealing with a corporation in which its members are interested.

The statutory law there involved contained these provisions:

"Sec. 445. The Mayor or any member of the council, or any city or town officer, or any relative or employee thereof shall not be directly or indirectly interested in the profits of any contract entered into by the council while he is or was an officer."

"Sec. 446. Every contract made in violation of any of the provisoin[s] of the two preceding sections may be avoided at the instance of any party except the officer interested therein."

Four taxpayers of the City of Livingston, Montana, brought an action to recover money which the City had paid for gasoline, lumber and other materials which had been consumed by the City. Some of the members of the City Council were employees of the corporation from which the materials were purchased. The members of the Court were all agreed that the contracts there involved were invalid. Three of the five members of the Court held that the money paid for materials purchased and consumed by the City could not be recovered. That it would be inequitable for the City to have the use of the materials and also the money. The other two Justices dissented, and



held that the money may be recovered notwithstanding the City had consumed the materials for which the money had been paid. Numerous cases are cited in support of both the prevailing and the dissenting opinions.

In the case of *Clark v. Utah Construction Co.*, 51 Idaho 857, 8 Pac. (2d) 454, there was involved the construction of a statute of Idaho which provided that:

"No member of the board (county commissioners) must be interested, directly or indirectly in any property purchased for the use of the county, nor in any purchase or sale of property belonging to the county."

A deed of county property was given to the wife of one of the Commissioners. The Court held that the deed was absolutely void without regard to whether the money used to pay for the deed was the separate money of the wife or community funds.

In the case of *Miller v. City of Martinez, et al.*, 28 Cal. App. (2d) 364, 83 Pac. (2d) 519, under a statute that public officers may not make or be interested in contracts made in their official capacity with themselves or become interested in contracts thus made, it is held that a member of a City Council is ineligible as such official to make or consent to making a contract with his private employee, and a contract so made is void as against public policy, and that the interest of the public officer need not be financial, but may be any interest which would tend to prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the city.

In the case of *Bay, et al., v. Davidson, et al.*, 111 S.W. 25, 133 Iowa 688, it is held that it matters not if he (council-

man) did in fact make his private interest subservient to his public duties. It is the relation that the law condemns, not the result.

In the case of *Foster v. Cope*, 60 N.J.L. 78, 36 Atl. 1089, it is held that a member of a City Council is disqualified from voting on a resolution awarding a contract to a corporation in which he was the holder of a single share of stock as collateral security for an unpaid note.

We shall not unduly prolong this Brief by an analysis of any of the numerous additional cases where the question of the disqualification of members of public offices are precluded from acting in cases where there is a conflict of interest. There does not seem to be any substantial conflict in adjudicated cases. There are some differences in the statutes of the various states, but the authorities generally are to this effect:

1. That any direct or indirect interest that may tend to influence a public officer from attending solely to the interests of the public which he is serving will disqualify such officers from participating in any transaction where his interests may conflict with the public interest.
2. That it is the relation of the public officer to those with whom dealings are had that is of controlling importance.
3. The fact that the officer make his other interest subservient to the public interest which he is serving does not remove his disqualification.
4. The matter of good or bad motives as well as the amount of money involved in a transaction is immaterial.

5. That in the absence of a statute so providing the interest that disqualifies the officer need not be monetary.

While there are cases which hold that a majority of the members of a City Council who are not disqualified may make a valid contract, the weight of authority seems to be that if any member is disqualified, especially if he votes for a contract, the same is invalid.

If the Court is not convinced from the texts and cases heretofore cited that they support propositions 1 to 5 just mentioned, we refer the Court to the following additional cases:

- Stockton Plumbing and Supply Co. v. Wheeler, 68 Cal. App. 292, 229 Pac. 1020;  
Nunemacher v. Louisville, 98 Ky. 334, 32 S.W. 1091;  
Byrne & Speed Coal Co. v. Louisville, 189 Ky. 346, 224 S.W. 885;  
Bradley, etc., Co. v. Jacques, (Ky.) 110 S.W. 836;  
Gillen Co. v. Milwaukee, 174 Wis. 362, 183 N.W. 679;  
Harrison v. Elizabeth, 70 N.J. Law 591, 57 A. 132;  
Hobbs, Welland Co. v. Milan, 293 Pac. 145;  
Woods v. Potter, 8 Cal. App. 41, 95 Pac. 1125;  
Ricks v. Woodward, 125 Cal. 119, 57 P. 777;  
Moody v. Shuffleton, 203 Cal. 100, 262 Pac. 1095;  
Osborn v. Stone, 170 Cal. 480, 150 Pac. 367;  
Pacific Vinegar Works v. Smith, 145 Cal. 352, 78 Pac. 550;  
Hardy v. Gainesville, 121 Ga. 327;

City of Fort Wayne v. The Lake Shore, etc. R.R. Co.,  
132 Ind. 558;

Milford Box v. Water Co., 124 Pa. 610;

O'Neil v. Flannagan, 98 Mo. 426;

Goodrich v. Waterville, 88 Maine 39;

Stone v. Bevaris, 88 Minn. 127;

Brown v. Street Lighting Dist. No. 1 of Woodbridge  
Tp., et al.,

Wresenthal v. Atlantic City, 73 N.J.L. 245, 63 A. 759.

See also: 140 A.L.R. 344, et seq.;

133 A.L.R. 1257;

74 A.L.R. 792;

73 A.L.R. 1092;

where the question of public officers' interest in contracts are annotated.

If we understand correctly, the contention of defendants City and Commissioners is that it is only monetary interest that is inhibited by *U.C.A.* 1953, 10-6-36, and that the members of the City Commission who are members of the Church of Jesus Christ of Latter-Day Saints have no monetary interest that may be said to be in conflict with their duty to serve only the interests of Salt Lake City.

We have heretofore directed the attention of the Court to the fact that the transaction brought in question by plaintiff's First Cause of Action is an attempt on behalf of the Corporation of the President acting through its owned Zions Securities to purchase the city property at First South and State Streets. That the Corporation of the President is the sole owner of Zions Securities Corporation, and that all of the assets of

the Corporation of the President are held in trust "for the benefit of the members of the Church of Jesus Christ of Latter-Day Saints, a religious society for the benefit of religion, for works of charity and for public worship." Thus the funds which are to be used for the purpose of purchasing the city property at First South and State Streets belong to the members of the L.D.S. Church. It is so provided in the Articles of Incorporation of the Corporation of the President.

The attention of the Court is directed to the following cases which discuss the purposes for which the trust fund now held by defendants Corporation of the President and/or Zions Securities may be used:

Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 34 L. Ed. 481, 140 U.S. 665, 35 L. Ed. 592;

Untied States v. Church of Jesus Christ of Latter-Day Saints, 150 U.S. 145, 37 L. Ed. 1033;

United States v. The Sole Corporation, The Church of Jesus Christ of Latter-Day Saints, et al., 5 Utah 361;

United States v. Church, 6 Utah 43;

United States v. Church, 8 Utah 310.

The Court may well become impatient before concluding the reading of those cases, some of which are exceptionally long. We shall, therefore, point out just what plaintiff claims for the law there announced.

It will be observed from a reading of the sylabii of the foregoing cases that an act of Congress declared a forfeiture of asubstantial part of the property belonging to the Church because the same was being used for an unlawful purpose,

namely for the teaching and practice of polygamy. The Act of Congress in so providing was sustained by the Supreme Court of the United States, whereupon the question was presented as to what should be done with the forfeited property. It was determined that a receiver should be appointed to take charge of the forfeited property, and such receiver should make a recommendation to the Court with respect to the disposition that should be made of such property. It is made to appear that the property so declared forfeited had been paid by the members of the Church to be used for the same purposes as that specified in the Articles of Incorporation of the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints above quoted, namely, for the benefit of the members of the Church and for works of charity, religion and public worship. It was suggested that the forfeited property be used for the support of the common schools. The Court rejected such suggestion for the reason that not all of those who attend the common school are members of the L.D.S. Church, and the trust fund could not be used for a purpose not intended by the donors. Before the matter was finally settled the Church had renounced the practice of polygamy, and that while the Church still maintained that the practice of polygamy was a correct doctrine, its practice having been discontinued, the forfeited property could be returned to the Church because it would no longer be used for the unlawful purpose. It is rarely that one finds pronouncement of both state and federal courts of last resort directly in point where the law applicable to state of facts such as are here present where it is adjudicated that trust funds may not be used for a purpose other than that for which the fund was given by the donor, except in case

the intended use of the fund is for an unlawful purpose. If, as the foregoing federal and state cases hold, that the money given to the Corporation of the Church of Jesus Christ of Latter-Day Saints must be used for the purposes for which the money was given by its members, so long as such proposed use is lawful it must follow that money given by the members of that Church to the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints must be used for the purpose stated in the Articles of Incorporation of the President of the Church of Jesus Christ of Latter-Day Saints. For this Court to hold otherwise would be to reverse both the Supreme Court of the United States and this Court.

In our research we have been unable to find a case which indicates that a trust fund such as is here involved may lawfully be used to purchase a site for a Federal Building, and we doubt that any such case can be found.

#### POINT FIVE

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST DEFENDANTS CITY AND ITS COMMISSIONERS WITHOUT GIVING THE PLAINTIFF AN OPPORTUNITY TO ESTABLISH THE FACTS ALLEGED IN HIS COMPLAINT TO THE EFFECT THAT THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS IS BEING USED FOR OFFICES FOR THE EMPLOYEES AND OFFICERS OF DEPENDANT CITY IN THE PERFORMANCE OF GOVERNMENTAL FUNCTIONS; THAT THE BUILDINGS THERE LOCATED ARE

AMPLE TO SERVE SUCH PURPOSE FOR MANY MORE YEARS; THAT NO PROVISION HAS BEEN MADE FOR ACQUIRING FACILITIES TO TAKE CARE OF THE NEEDS THAT ARE NOW BEING PROVIDED FOR BY THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS, AND DEFENDANT CITY IS PRESENTLY WITHOUT THE NECESSARY FUNDS TO SECURE OTHER BUILDING OR BUILDINGS TO SUPPLY THE NEEDS OF DEFENDANT CITY WHICH ARE NOW PROVIDED FOR BY THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS.

But little need be said in support of this point. Plaintiff is entitled to be heard on the allegations of his Complaint, and if the facts therein alleged are found to be true, he is entitled to prevail.

While the City and its Commissioners filed an Answer in effect denying the allegations mentioned in this Point Five, the Answer of defendants City and its Commissioners may not be said to support the Motion to Dismiss the Complaint. No Finding was or could properly be made as to the truth of the allegations of the Answer without evidence to support the same. The allegations of the Complaint above referred to and the allegations of the Answer made an issue that required a trial to ascertain wherein lies the truth.

#### POINT SIX

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MOTION OF LYNN FAUSETT AND



FIAMETTA FAUSETT TO INTERVENE IN THIS ACTION.

*Rule 24 of the Utah Rules of Civil Procedure* provide:

"Upon timely application anyone shall be permitted to intervene in an action (1) when a statute confers an unconditional right to intervene or (2) when the representation of the applicants' interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action, or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

*Subdivision (b) of Rule 24* provides for Permissive Intervention.

The Fausetts contend that they come within Subdivision (a) of Rule 24 and, therefore, have a right to intervene.

In their proposed Complaint of Intervention, paragraph 2 thereof, the Fausetts allege:

"That these plaintiffs in intervention are and at all times herein alleged have been residents of Salt Lake City and County, State of Utah; that they are now and at all times herein alleged have been property owners and taxpayers in said City, County and State, and that they are and at all times herein alleged they have been members of the Church of Jesus Christ of Latter-Day Saints (the religious organization mentioned in the Complaint filed herein) and have made contributions in tithing and otherwise to said Church; that by reason of said contributions so made and being members of such Church they have a vested interest in the Trust Fund mentioned in the Complaint filed herein."

In paragraph 2 they allege that they bring their action for all other persons similarly situated because the members are so numerous that it is impossible to make all of such members parties to the action. They also adopt the allegations of the Complaint. It will be observed that in the Complaint plaintiff does not claim that he is presently a member of the L.D.S. Church. That being so it may be doubted if he may be heard to complain of the manner in which the trust fund held by defendants Corporation of the President and Zions Securities are being expended notwithstanding plaintiff while a member of such Church paid his tithing and made other contributions to the L.D.S. Church.

In light of these facts the interest of the Fausetts in the trust fund here involved may well be inadequately represented by plaintiff, and their interest in the trust fund may be adversely affected if the Court should hold that some of such fund may be used to purchase a Federal Building.

#### POINT SEVEN

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST DEFENDANT CORPORATION OF THE PRESIDENT AND/OR DEFENDANT ZIONS SECURITIES CORPORATION WITHOUT GIVING PLAINTIFF AN OPPORTUNITY TO SHOW AS ALLEGED IN HIS COMPLAINT THAT SUCH CORPORATION INTENDS TO AND WILL, UNLESS RESTRAINED BY THE COURT, UNLAWFULLY AND WITHOUT AUTHORITY USE SOME OF THE TRUST FUNDS HELD BY IT FOR THE PURPOSE OF

## PAYING OR CAUSE TO BE PAID SOME OF THE COSTS OF PURCHASING A SITE FOR A FEDERAL BUILDING.

Without repeating what is said under the foregoing Point Four, we adopt the same in support of this Point Seven. It was argued in the court below and the trial court apparently took the view that the funds held by the Corporation of the President and/or Zions Securities are not trust funds; that the members of the City Commission who are and were at the time and times complained of also members of the L.D.S. Church and had no interest in the fund held by the Corporation of the President and Zions Securities; that any interest that the City Commisisoners may have in the funds so held by such Corporations were not a monetary interest, and, therefore, such Commissioners were not disqualified from participating in a sale of the City property to Zions Securities or its nominee.

It may be inquired if the members of the City Commission who are and were members of the L.D.S. Church at the time complained of were not the owners of an interest in the trust fund held by the defendants Corporation of the President and Zions Securities, who owns that property? The members of the L.D.S. Church are expressly made the beneficiaries of the property of the Corporation of the President by its Articles of Incorporation. The Corporation of the President owns Zions Securities Corporation. There is thus no escape from the conclusion that the City Commissioners are among the persons who own the assets of defendants, Corporation of the President and Zions Securities. If such ownership is not a monetary interest, then what sort of an interest is it? Plaintiff is prepared to show that the Corporation of the President

and Zions Securities are the owners of several hundred million dollars worth of real and personal property, among which are colleges, churches, temples, real estate, various kinds of commercial enterprises, together with stocks and investments in numerous undertakings. It may well be that the members of the L.D.S. Church have no right to take possession of such assets, but they do have a right to have the same applied to the purposes for which it was created, and which are specified in the Articles of Incorporation of defendant Corporation of the President.

The facts in this case will show that the members of the L.D.S. Church who were and are members of the Commission of Salt Lake City have a very substantial financial or proprietary interest in the property here involved. The members of the L.D.S Church have a pecuniary interest in the trust fund held by the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints. It is so provided in its Articles of Incorporation. The fund was given to the Church, or to its corporation, for the purpose set out in the Articles of its Corporation of the President of the Church, namely, for the members of the Church. It would seem obvious that to have a Church, a Tabernacle and a Temple available to attend by a beneficiary and his family without charge is a financial advantage or interest of the highest order. To have schools in which one's religious beliefs are taught are not without monetary value. To have hospitals maintained for one's use and for an assurance that in case of financial misfortune one's needs in case of sickness will be cared for, are matters which have a financial value not to be lightly cast aside. In the case of a beneficiary of a trust fund the beneficiary thereof has a

right to have the fund applied to the uses provided for in the instrument creating the fund. The same is true of the stockholders in a corporation. In the one case the trustee and in the other the Board of Directors control the fund intrusted to them. In each case the fund must be used for the purposes and in the manner provided for by the instrument creating the fund. In each case the benefits to be derived from the money or other property involved in the venture must be used for the benefit of the persons who own the fund, in the one case for the beneficiaries, and in the other the stockholders. If a trust fund is not being used for the purposes provided in the instrument creating the fund, the remedy is by bringing an action against the trustee to force compliance with the provisions of the instrument creating the fund. If the trust is a private trust, the proceeding should be brought by one or more of the beneficiaries of the trust. *Boquist on Trust and Trustees, Vol. 1, page 274*, where the following cases are cited which support the text:

Barker v. Crane, 100 A. 900; 87 N.J. Eq. 227;  
Hamilton v. Muncie, 169 N.Y.S. 826;  
McElvie v. Adams, 97 S.E. 733, 108 S.C. 437;

But suppose by some metaphysical reasoning it should be concluded that the interest of the members of the City Commission who were also members of the L.D.S. Church is not a monetary interest, how stands the case?

It is the very essence of the L.D.S. religion that the President of that Church, who also constitutes the Corporation of the President, is a prophet, seer and revelator, and as such such is the emissary of diety on this earth. The Court will take

judicial notice of that being so. *Hilton v. Roylance*, 25 U. 129, 69 Pac. 660. If it be kept in mind that the disqualification of a public officer is determined by his relation to the party with whom a transaction is to be had, there would seem to be no room for doubt that a member of the L.D.S. Church who is urged by the prophet, seer and revelator of his Church and the emissary of diety on this earth would be prone to comply with a request coming from that source. It would be an act bordering on heresy not to do so. If there is any doubt about that being so, plaintiff is entitled to and will, if permitted, establish that fact in conformity with the allegation contained in (b) of paragraph 21 of his Complaint. The authorities heretofore cited teach not only must a City Commissioner be loyal solely to the interests of the city, but he may not put himself in a position that may tend to cause him to do otherwise.

It may further be observed that the provisions of *U.C.A.* 1953, 10-6-38, does not designate the kind of interest that disqualifies a commissioner from participating in a transaction when he has an adverse interest. To say that it must be a monetary interest is to ignore the plain language of the act. It will be observed that in the cases indicating that the interest must be monetary it is so provided in the statute being construed.

## POINT EIGHT

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S FIRST CAUSE OF ACTION AGAINST THE DEFENDANT ZIONS SECURITIES CORPORATION, IN

THAT SUCH CORPORATION ALREADY HAS RECEIVED A CONVEYANCE FROM THE BOARD OF EDUCATION OF SALT LAKE CITY FOR A SITE KNOWN AS THE LAFAYETTE SCHOOL SITE UNDER THE PRETEXT THAT THE SAME IS FOR THE ERECTION THEREON OF A FEDERAL BUILDING, THAT ONLY ONE FEDERAL BUILDING IS PLANNED AT THIS TIME, AND BY REASON OF SUCH FACT DEFENDANT ZIONS SECURITIES CORPORATION IS ESTOPPED FROM SEEKING ANOTHER SITE FOR A FEDERAL BUILDING.

It will be noted from the pleadings that the Board of Education of Salt Lake City has heretofore conveyed to defendant Zions Securities Corporation a site which is claimed to be for a Federal Building. While that case has not yet been finally disposed of, Zions Securities Corporation has a conveyance of the Lafayette School site which was acquired for the purpose of having erected thereon a Federal Building. That being so, defendants may not be heard to seek another site for a Federal Building without releasing all claims to the Lafayette School site. One of the bases for the application of the doctrine of estoppel is thus stated in 19 *Am. Jur.*, page 650, Sec. 50:

“Generally speaking a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least when he had or was chargeable with full knowledge of the facts and another will be prejudiced by his action.”

Numerous cases from obth state and federal courts are cited in footnotes to the text, some of which we have examined and they support the law announced in the text.

Defendants may not use a pretext for acquiring public property that the same is being acquired for a site for a public building and after having by that means acquired one piece of public property proceed to acquire another piece of property while continuing to hold the first piece so acquired.

#### POINT NINE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT ZIONS SECURITIES CORPORATION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT, AS ALLEGED IN THE COMPLAINT SAID DEFENDANT IS WITHOUT AUTHORITY TO USE THE TRUST OR OTHER FUNDS HELD BY IT TO PAY PART OF THE PURCHASE PRICE OF A SITE FOR A FEDERAL BUILDING.

It is, of course, uniformly established that a private corporation has such powers and only such powers as are granted to it by its Articles of Incorporation.

The law is thus expressed in 19 *C.J.S. Sec. 935, page 369*:

"A corporation has no natural rights or capacity such as an individual or an ordinary partnership and has no powers except such as are expressly or impliedly conferred by its charter. This principle was well established in the civil law and in adopting corporate institutions from that law the same principle was adopted as a part of the English common law and it applies to every kind of corporation."



There will be found collected in footnotes to the text numerous state and federal cases which support the text. Among the cases which in effect so held are: *Hadlock v. Callister*, 85 Utah 510, 39 Pac. (2d) 1082; *Getzhoffen v. Sisters of Holy Cross Hospital Assn.*, 32 Utah 46; *Gorey v. St. Joe Mine Co.*, 32 Utah 497, 91 Pac. 369. It was argued in the court below that it did not appear that plaintiff is a stockholder in defendant Zions Securities. Such fact does not prevent him from being heard that the City is attempting to convey property to one for a purpose not authorized by law. Moreover, as heretofore argued, the Fausetts being owners of an interest in the trust fund held by the Corporation of the President and/or Zions Securities had an interest in the manner in which the assets of such corporation are being used. It will be seen that plaintiff in his Complaint alleged that Zions Securities was without authority to use the assets held by it for the purpose of purchasing a site for a federal building. That being so, plaintiff and the Fausetts are entitled to be heard on that issue.

Moreover, tested by the well-established law that a corporation has only such powers as are granted to it by the law making power and as provided in its articles of incorporation, the defendant Corporation of the President may not lawfully own and operate such corporations as defendant Zions Securities. Under the provisions of our statutory law, Title 16, Chapter 7 of U.C.A. 1953, it is provided:

§1 "Corporations sole may be formed for acquiring holding or disposing of church or religious society property for the benefit of religion, for works of charity, and for public worship in the manner herein-after provided."

§ 2 provides for the persons who may become a corporation sole and the manner of creating such a corporation.

§ 6 provides for the powers that may be exercised by a corporation sole. Subsection (1) thereof provides that it shall have power "to acquire and possess by donation, gift, bequest, devise or purchase, and to hold and maintain property, real, personal and mixed, and to grant, sell, convey, rent or otherwise dispose of the same as may be necessary to carry on or promote the objects of the corporation."

The other provisions granting powers to corporations sole have no application to the matter now being discussed. For authorities holding that religious corporations may not lawfully engage in enterprises for profit, see 100 A.L.R. 579 and 76 C.J.S. 780 and cases there cited.

If the Corporation of the President may not directly spend its funds for the purchase of a site for a federal building, it necessarily follows that it may not create a corporation with the power to do that which the parent corporation is powerless to do. It will further be noted that plaintiff in his complaint alleges that defendant Zions Securities is without power to use its funds to aid in the purchase of a site for a federal building. The trial court was in error in denying plaintiff the right to show that Zions Securities is without authority to use its funds to assist in the purchase of a site for a federal building. When the facts in this case are revealed, it will be made to appear that the Church of Jesus Christ of Latter-Day Saints, the Corporation of the President of such church, and Zions Securities Corporation, together with other corporations owned solely by the Corporation of the President, are all in essence one and

the same organizations. That being so, it follows that the powers of the parent corporation may not lawfully enlarge its powers by creating additional corporations which are owned and operated by the parent corporation.

If the Corporation of the President may organize or cause to be organized corporations which are owned and controlled by the Corporation of the President and which are vested with the powers usually exercised by corporations organized for profit, the Corporation of the President may by that means acquire unlimited power contrary to and in violation of the provisions of Title 16, Chapter 7 of U.C.A., 1953.

#### POINT TEN

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT ZIONS SECURITIES CORPORATION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT, AS ALLEGED IN THE COMPLAINT, TO PERMIT SAID DEFENDANT AND ITS OWNER, DEFENDANT CORPORATION OF THE PRESIDENT, TO USE THE TRUST FUND ENTRUSTED TO THEM FOR THE PURPOSE OF PAYING PART OF THE PURCHASE PRICE OF A FEDERAL BUILDING IT WILL RESULT IN THE TAKING OF PROPERTY OF THE BENEFICIARIES OF SUCH TRUST FUND WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE PROVISIONS OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND OF SECTION 7 OF ARTICLE ONE OF THE CONSTITUTION OF UTAH, AND LIKEWISE CONTRARY TO AND IN VIOLATION OF SEC-

TION 22 OF ARTICLE ONE OF THE CONSTITUTION OF UTAH AND OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDE THAT PRIVATE PROPERTY MAY NOT BE TAKEN FOR A PUBLIC USE WITHOUT JUST COMPENSATION.

It may be that if plaintiff has forfeited his right to his interest in the trust fund, he may not be heard to complain if defendants use such fund for a purpose not authorized by law, but that does not apply to the Fausetts. As we have heretofore pointed out, they have a vested interest in such fund, and if the Court should so construe the law of Utah as to permit the use of that fund to pay for a part of a Federal Building site, such use would be at war with the very essence of due process of law, and would constitute a taking of property for a public purpose without compensating the owners of said trust fund, contrary to the provisions of the State and Federal Constitutions above mentioned. Certain it is that if the Fausetts may thus be deprived of their interest in the trust fund, there is a total absence of due process of law, and likewise if their interest in the trust fund may be lawfully used to pay for part of a Federal Building site without them being paid for the same, it will constitute the taking of their property without compensation. To hold otherwise will be to ignore their constitutional rights.

#### POINT ELEVEN

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT ZIONS SECURITIES COR-

PORATION TO DISMISS PLAINTIFF'S FIRST CAUSE OF ACTION, IN THAT PLAINTIFF BY SUCH RULING IS DEPRIVED OF HIS RIGHT TO SHOW THAT BY THE TRANSACTION BY WHICH DEFENDANT ZIONS SECURITIES, AND ITS OWNER, THE CORPORATION OF THE PRESIDENT, SEEK TO INDUCE THE UNITED STATES TO SELECT A SITE FOR A FEDERAL BUILDING PROPERTY WHICH IS NECESSARY AND IS BEING USED FOR THE PERFORMANCE OF ITS GOVERNMENTAL FUNCTIONS AS AN ARM OF THE STATE, AND IN AN ATTEMPT TO DOMINATE THE STATE AND TO INTERFERE WITH ITS FUNCTIONS, CONTRARY TO AND IN VIOLATION OF SECTION 4 OF ARTICLE ONE OF THE CONSTITUTION OF UTAH.

It is a matter of the history of Utah of which the Court wil take judicial notice, that prior to the admission of Utah as a state of the United States the people of Utah were divided into two political parties, one known as the Peoples Party, to which belonged the members of the L.D.S. Church, and the other known as the Liberal Party, to which belonged the residents of Utah who were not members of the L.D.S. Church. This condition led to many unpleasantries and to the injury of the welfare of the then Territory of Utah.

When the Constitution of Utah was being written it was sought to do away with this condition, and to have the State divide on national party lines. To accomplish that end Section 4 of Article One was placed in the Constitution. It will be seen from the allegations of the Complaint that defendants Corporation of the President and Zions Securities have within

the period of one year attempted, and if permitted to prevail in this action, will have acquired three very important tracts of land which have heretofore and are now being used for carrying on some of the most important functions of the arms of the State. In each case that purpose is sought to be accomplished by public officials who are members of the L.D.S. Church, and if permitted to do so, plaintiff will show that some of such members of such Church are the holders of important positions in that Church. That being so, the plan to secure the title to the public property here involved is calculated to enable such defendants to dominate the affairs of the State, and to interfere with its functions, contrary to the provisions of Section 4 of Article One of the Constitution of Utah.

#### POINT TWELVE

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANTS CHAMBER OF COMMERCE AND ITS SECRETARY, GUS P. BACKMAN, TO DISMISS THE FIRST CAUSE OF ACTION, IN THAT SUCH DEFENDANTS BEING PARTIES TO THE PURPORTED CONTRACT FOR THE SALE OF THE CITY PROPERTY AT FIRST SOUTH AND STATE STREETS ARE INDISPENSABLE PARTIES TO PLAINTIFF'S FIRST CAUSE OF ACTION.

It is uniformly held to be the law that all parties to a contract are indispensable unless the contract is severable. As heretofore pointed out, the Court erred in dismissing plaintiff's First Cause of Action as to defendant City and its Commis-

sioners. If that be so, it was likewise error to dismiss the action as to defendants Chamber of Commerce and Gus P. Backman.

One of the leading cases dealing with the question of when a party should be made a defendant, and when a party must be made a defendant is that of *Shields v. Barron*, 17 How. 130, 139, 15 L. Ed. 158, 161. That case has repeatedly been cited and followed by state and federal courts.

From our research that case has never been overruled or the doctrine there announced questioned. It is there said:

"Persons having an interest in the controversy and who ought to be made parties in order that the court . . . may finally determine the entire controversy and to complete justice by adjusting all the rights in it . . . are commonly termed necessary parties, but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete final justice without affecting other persons, not before the court, the latter are not indispensable parties. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and in good conscience are indispensable parties."

In this case the agreement here brought in question was between defendants Chamber of Commerce by its Secretary, Gus P. Backman, and the City. The Chamber of Commerce cannot be eliminated from the contract, as there would be no one before the court with whom the City has a contract. Moreover, it is alleged in the Complaint that neither defendant

Gus P. Backman nor the Chamber of Commerce had authority to make the contract here brought in question. If that be so, the purported contract is a nullity. In order that the legal effect of the purported contract may be determined, it is necessary to have before the court Gus P. Backman. That is the effect of *Rule 19 of the Utah Rules of Civil Procedure*.

### POINT THIRTEEN

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS DEFENDANT CORPORATION OF THE PRESIDENT FROM THE SECOND CAUSE OF ACTION, IN THAT SUCH DEFENDANT IS AN INDISPENSABLE PARTY TO THE ACTION INVOLVING THE VALIDITY OF THE PURPORTED CONTRACT WHEREBY DEFENDANT CITY SEEKS TO SELL AND DEFENDANT CORPORATION OF THE PRESIDENT SEEKS TO PURCHASE THE FOREST DALE PARK.

Much of what has been said in support of Point Twelve is applicable to this point, and we adopt the same in support of this point. The error in granting the Motion of the Corporation of the President dismissing the action as to it, and denying the Motion of the City and its Commissioners to dismiss the action as to them leaves this Second Cause of Action hopelessly suspended. That the Corporation of the President is an indispensable party to the Second Cause of Action is obvious. It is one of the parties to the purported contract for the sale of the Forest Dale Park. Any judgment rendered in the cause must of necessity affect the rights, if any,



of defendant Corporation of the President. That being so, the trial court is powerless to proceed without the Corporation of the President being a party to the action. Thus a stalemate is created by the ruling of the trial court dismissing the action as to the Corporation of the President, and denying the Motion of defendants City and its Commissioners to dismiss the action as to them. While the defendants City and its Commissioners remain in the action the court is powerless to proceed further against them because a court may not proceed to hear and determine a case in the absence of an indispensable party such as defendant Corporation of the President.

#### POINT FOURTEEN

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT CORPORATION OF THE PRESIDENT AND OF ITS OWNED DEFENDANT ZIONS SECURITIES CORPORATION TO DISMISS PLAINTIFF'S SECOND CAUSE OF ACTION, IN THAT, BY SUCH DISMISSAL, PLAINTIFF IS PREVENTED FROM SHOWING THAT SUCH DEFENDANTS ARE DOMINATING THE FUNCTIONS OF AN AGENCY OF THE STATE OF UTAH, AND INTERFERING WITH ITS FUNCTION CONTRARY TO AND IN VIOLATION OF SECTION 4 OF ARTICLE ONE OF THE CONSTITUTION OF UTAH.

In support of this Point we adopt what is said under Point Eleven of this Brief.

## POINT FIFTEEN

THE TRIAL COURT ERRED IN FAILING TO DENY THE VARIOUS MOTIONS OF DEFENDANTS TO SEVER THE TRIAL OF THE TWO CAUSES OF ACTION.

*Rule 20 of Utah Rules of Civil Procedure* provides:

"All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of, as arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded, judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities."

In each of the causes of action alleged in the Complaint the City is attempting to convey City property to the Corporation of the President, or what amounts to the same thing, to Zions Securities, which is owned by the Corporation of the President. In each cause the members, or a majority of the members, of the City Commission who participated in the attempted sale were members of the L.D.S. Church, and as such disqualified from participating in the attempted sale. That being so, there is a question of law common to each cause of action, namely, whether the transaction is valid because of the members of the City Commission who are members of the L.D.S. Church may lawfully participate in a contract for the sale of City property, and whether as a matter of law it is necessary to enact an ordinance authorizing the sale of

City property before the same may lawfully be sold. The determination of these two questions may well be of controlling importance. The trial and determination of the First Cause of Action will in effect dispose of the Second Cause of Action. That being so, nothing will be accomplished by severing the two causes of action, and the time of the Court and Counsel will be needlessly wasted.

#### POINT SIXTEEN

THE TRIAL COURT ERRED NOT ONLY IN THE MATTERS HEREINBEFORE MENTIONED, BUT IN FAILING TO HAVE THIS CASE PROCEED TO A FINAL DETERMINATION IN THE MANNER PROVIDED BY LAW AND THE PRACTICE OF THE COURT TO THE END THAT SALT LAKE CITY MAY ACQUIRE A FEDERAL BUILDING IN A LAWFUL MANNER.

The law is, of course, well settled that an action may not lawfully be dismissed upon motions such as were here filed unless the Complaint fails to state a cause of action upon which relief may be granted. The numerous errors committed by the trial court which plaintiff has presented and argued in this Brief show that plaintiff's Causes of Action are not so wanting in either facts or law as to be vulnerable to attack by Motions to Dismiss.

Plaintiff and the proposed Intervenors, therefore, submit that the judgment of the trial court be reversed; that this Court pass upon the various Points urged herein to the end that a new trial be had, and the Court below be advised as to the law

applicable to the facts alleged in the Complaint, and in the proposed Complaint in Intervention.

Respectfully submitted,

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